* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

October 17, 2008

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: February 5, 2008

Case Number: TSO-0599

This Decision concerns the eligibility of XXXXXXX(hereinafter referred to as "the individual") to hold an access authorization[1] under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." The individual's new employer has requested that the DOE reinstate the individual's security clearance. For purposes of this proceeding, the individual is considered an applicant for a DOE access authorization. After carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should not be granted.

I. Background

The individual held a DOE security clearance for almost 40 years with different contractors until October 7, 2005, when his employer at the time (hereinafter referred to as DOE Contractor #1) informed him that his services were no longer needed. In the months preceding the individual's termination, DOE Contractor #1 and the DOE learned that one or more of the individual's subordinates had made improper classification decisions that had resulted in the release and possible compromise of a significant amount of classified information. An investigation by an Inquiry Official appointed by DOE Contractor #1 into the incidents of security concern revealed that the individual, as a manager, had borne some responsibility for the compromise of classified information at issue. Accordingly, DOE Contractor #1 issued three Security Infractions to the individual.[2]

[1] Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

[2] DOE Contractor #1 issued the three Security Infractions at issue three weeks after the individual's termination.

Shortly after being terminated by Contractor #1, the individual secured employment with another DOE contractor, DOE Contractor #2. DOE Contractor #2 subsequently requested the DOE to reinstate the individual's security clearance. When the local security office (LSO) learned that DOE Contractor #1 had issued three Security Infractions to the individual, the LSO conducted a Personnel Security Interview (PSI) with the individual in May 2006 to inquire about the matter (2006 PSI). The LSO conducted a second PSI with the individual on January 19, 2007 (2007 PSI). Unable to resolve the security concerns associated with the three Security Infractions, the LSO initiated administrative review proceedings in October 2007, by issuing a letter (Notification Letter) advising the individual that it possessed reliable information that created a substantial doubt regarding his eligibility to hold a security clearance. In an 18-page attachment to the Notification Letter, the LSO explained in great detail the derogatory information at issue and advised that the derogatory information fell within the purview of one potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsection (g) (hereinafter referred to as Criterion G).[3]

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. On February 7, 2008, the Director of the Office of Hearings and Appeals (OHA) appointed Robert Palmer the Hearing Officer in this case. On April 16, 2008, I was appointed the substitute Hearing Officer in the case. After obtaining two extensions of time from the OHA Director,[4] I convened a two-day hearing[5] in the case during which I took almost 19 hours of testimony. At the hearing, seven witnesses testified. The LSO called two witnesses and the individual presented his own testimony and that of four other witnesses. In addition to the testimonial evidence, the LSO submitted 18 exhibits into the record, including one sanitized document approximating 600 pages; the individual tendered 21 exhibits. I permitted both parties to submit written closing arguments into the record after the hearing. I closed the record in this case on August 11, 2008, after I received the hearing transcript. Since the transcript of the two-day hearing is not sequentially numbered, the transcript will be cited as "Day 1 Tr. at page number" and "Day 2 Tr. at page number." The exhibits submitted in the case will be cited as "Ex." followed by the appropriate numeric or alphabetic designation.

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[3] Criterion G involves behavior where a person has "failed to protect classified material, or safeguard special nuclear material; or violated or disregarded security or safeguards regulations to a degree which would be inconsistent with the national security; or disclosed classified information to a person unauthorized to receive such information; or violated or disregarded regulations, procedures, or guidelines pertaining to classified or sensitive information technology systems." 10 C.F.R. § 710.8(g).

[4] The Director granted the first extension so that the individual's Counsel could complete taking some depositions in a civil action against DOE Contractor #1 which arguably had some bearing on the issues before me. The Director granted the second extension to allow the parties an opportunity to review a crucial 600-page report that the DOE Counsel tendered into the record one week before the hearing date. The report, DOE Exhibit 13, was a sanitized version of a classified report detailing the incidents at the heart of this case.

[5] The second day of the hearing occurred 33 days after the first day due to difficulty coordinating the parties' and witnesses' schedules.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that granting him an access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concern at Issue

As previously noted, the LSO cites one criterion as the basis for proceeding to administrative review in this case, Criterion G. In an 18-page Statement of Charges (SOC), the LSO sets forth the following information as support for its reliance on Criterion G: (1) three Security Infractions issued to the individual on October 5, 2005, and the events underlying those Infractions; (2) statements made by the individual during the 2006 and 2007 PSIs; (3) a Final Incident Report issued on July 7, 2005, detailing the

Inquiry Official's investigation into an "Incident of Security Concern" (hereinafter referred to as the IOSC Report); (4) a Report dated August 22, 2005, of an Independent Review of the incidents outlined in the IOSC Report; and (5) information contained in a Corrective Action Plan dated October 19, 2005, regarding the security incidents at issue. In brief, the individual, in his capacity as a manager in a highly classified facility, is alleged to have fostered or tolerated, either by design or negligence, a work environment in which his subordinates felt free to ignore DOE's explicit classification direction, the consequence of which lead to numerous compromises of classified information at Contractor #1's work site.

I find that the information set forth above constitutes derogatory information that raises questions about the individual's trustworthiness, judgment, reliability, and ability to safeguard classified information. *See* Guideline K of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House. For this reason, I determine that the LSO properly invoked Criterion G in this case.

IV. Findings of Fact

Many of the facts in this case are disputed. In addition, there is discrepant testimonial evidence on some critical matters before me. My findings below are based entirely on my evaluation of the unclassified documentary evidence before me,[6] my assessment of the credibility of the witnesses who provided testimony over a period of almost 19 hours, and my common sense judgment regarding the proper care and safeguarding of classified information by holders of DOE security clearances. To understand some of the disputed issues, I have set forth a chronology of the major events in this case, while simultaneously making findings on pivotal matters such as the import of the 2002 DOE Classification Guide and other DOE guidance, the authority of the DOE to regulate all matters relating to classification issues, and the interplay between DOE Classification Guides and Contractor #1's Supplemental Classification Guide.

At all times relevant to this proceeding, the individual served as a manager of a project that was, for the most part, classified in nature. At no time during his employment with DOE Contractor #1 did the individual perform duties as a Contractor "Derivative Classifier" (hereinafter referred to as "DC"). [7] Ex. 6 at 9. However, three employees who reported to the individual did perform collateral duties as Contractor DCs[8] during the

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[6] It is quite possible that the classified IOSC Report in this case could provide more illumination on some facts that I could not glean from the unclassified file before me.

[7] A DC determines whether a document or material contains classified information. According to DOE's Manual for Identifying Classified Information, a Contractor Derivative Classifier must have a relevant scientific or technical degree or work experience which is validated by the person who appoints him or her to the position, must be competent in the subject areas in which his or her authority will be used, and must be familiar with DOE classification policy, procedures, and guidance. *See* DOE Manual 475.1-1B and earlier versions of that Manual.

[8] There is a dispute whether one of the three DCs was authorized to act in the capacity as DC for DOE Contractor #1. The resolution of this matter, however, is not germane to the critical questions before me.

relevant period. These Contractor DCs reported to a Contractor Classification Officer in executing their Contractor DC duties, but reported to the individual when they performed their technical, and scientific core duties.

In 2002, the DOE issued a Classification Guide that pertained specifically to the activities conducted by Contractor #1 (hereinafter this guide will be referred to as "2002 DOE Classification Guide"). *See* Day 1 Tr. at 32, 34-35, 44-45, 54, 82; Ex. 13. According to a DOE Classification Analyst whose testimony I found to be credible and compelling, almost everything relating to the activities of Contractor #1 was considered to be classified in the 2002 DOE Classification Guide. *See* Day 1 Tr. at 42-44. The DOE Classification Analyst also convinced me that: (1) a Contractor DC could only deem something to be "unclassified" if the 2002 DOE Classification Guide explicitly stated that information was "unclassified" and, (2) the Contractor DCs at Contractor #1 could not exercise any discretion to determine what was unclassified under the 2002 DOE Classification Guide. *Id.* at 42-43. The Classification Analyst's testimony on this matter is bolstered by some documentary evidence in the case, specifically, training materials for Contractor DCs, which clearly stated that Contractor DCs had "very little discretion, freedom, lee-way, power, or authority to interpret classification guide topics" in the subject area relating to the activities of Contractor #1. *See* Ex. 13.

Sometime in 2003, Contractor #1 sought permission to develop its own classification guide (hereinafter referred to as the Supplemental Classification Guide) to supplement, not supercede, the 2002 DOE Classification Guide. Contractor #1 hired a subcontractor (hereinafter referred to as "Mr. X") to write the Supplemental Classification Guide. The Contractor's Supplemental Classification Guide was approved by the DOE and issued on either October 30, 2004 or November 30, 2004. *See* Day 1 Tr. at 54; Ex. 8, Ex. 7 at 55. Contractor #1 did not, however, distribute the supplemental guide to its employees until May 2005. Ex. 6 at 21. A major source of dispute in this case is whether the Contractor's Supplemental Classification Guide classified more or less information than the 2002 DOE Classification Guide. The DOE Classification Analyst's position on this matter is very clear. He testified that the Supplemental Classification Guide was less strict than the 2002 DOE Classification Guide because the former detailed more unclassified matters than the latter. [9] *See* Day 1 Tr. at 45. I accorded substantial weight to the DOE Classification Analyst's testimony not only because he convincingly and succinctly explained the rationale for his position but because any dispute regarding classification issues is ultimately resolved by the DOE. Incredibly, the individual and at least one Contractor DC held just the opposite view, believing that the Contractor Supplemental Classification Guide, when implemented, would result in more information being classified than under the 2002 DOE Classification Guide. *See* Day 1 Tr. at 43, 205; Day 2 Tr. at 35, 52. The record developed in this case supports a finding that the individual and others employed by Contractor #1 did not proactively press for the release of the

[9] The import of this finding is that even if it is true that Contractor #1 did not distribute the Supplemental Guide until May 2005, as the individual contends, the Contractor DCs should have been protecting all information at their facility according to the mandate that everything was classified unless specifically enumerated as unclassified in the 2002 DOE Classification Guide.

Contractor Supplemental Classification Guide because they mistakenly believed the implementation of that guide would require more classification scrutiny of their work, thereby adversely impacting their budget and schedule. *See* Day 1 Tr. at 43, 95, 205; Day 2 Tr. at 52, 126.

Sometime in late June 2004, the Security Manager for Contractor #1 (the person who would ultimately be named as the Inquiry Official in this case) drafted a memo in which he expressed concerns about Contractor #1's lack of diligence in protecting classified information. *See* Ex. 13, Ex. S-2. Of significance is the Security Manager's account of several incidents that lead him to conclude that the individual and others were violating DOE orders concerning classification to meet production goals. *Id.* at 2. The Security Manager informed his management of his intention to resign because of the incidents raised in the memo. *Id.* at 3.

On July 20, 2004, a DOE Classifier issued a Memorandum, hereinafter referred to as the "Born Classified Memo," which reminded those on the distribution list that everything about certain technologies (which included technology at Contractor #1's facility) is classified upon origination and remains classified forever, unless a DOE Headquarters-approved classification guide or classification bulletin indicates otherwise. The Born Classified Memo set forth the sanctions, including civil and criminal penalties, associated with knowingly, willfully, or negligently acting in a manner that resulted in the misclassification of information. See Ex. 8, Attachment 4.

On August 11, 2004, numerous Contractor DCs, including those employed by Contractor #1, received training on the Born Classified Memo. *See* Day 1 Tr. at 140-141; Day 2 Tr. at 112. Immediately after that training, three DCs from Contractor #1 approached the individual and related their collective concerns about implementing the Born Classified Memo. Day 1 Tr. at 140-141. One of the Contractor DCs who testified at the hearing related that he even threatened to resign as a DC because the implementation of the Born Classified Memo would have "stop[ped] the program." *See* Day 2 Tr. at 146. That same Contactor DC admitted that he told the individual that he thought the Supplemental Classification Guide "was killing the program [at Contractor #1]." *See* Day 2 Tr. at 52. To address his Contractor DCs' concerns, the individual consulted with his manager whose office was in another State. The individual's manager told the individual to inform the three DCs to continue their DC "functions as usual until further notice from your management." Ex. 8, Attachment 5. The individual relayed this information to the three DCs in an August 16, 2004, e-mail, along with the statement that [Contractor #1] "would take steps to indemnify the DCs from any civil penalties." *Id.* One of the DCs responded to the subject e-mail as follows: "I was concerned more about Leavenworth than the civil issues . . ." *Id.* The individual's manager responded to this e-mail thread by relating than "[m]ore than likely I will be in there with you. Really prefer one of those federal country club prison facilities. The one in California is particularly nice." *Id.* Finally, the individual sent an e-mail to his manager stating: "As you know I'm leaving for California in a few minutes. Don't tell anyone where I've gone." *Id.* One of the DCs who was a recipient of the e-mail chain related above, and who testified at the hearing, characterized the e-mail exchange as a "light-hearted exchange" between a DC and a high level official at Contractor #1. However, I find that a reasonable person could infer from the e-mail

exchange set forth above that the individual and his manager knew that their direction to the DCs to "continue business as usual" could result in erroneous classification decisions which, in turn, might violate the civil and criminal penalty provisions of 10 C.F.R. § 1045.5(a), *i.e.*, the sanction provision cited in the Born Classified Memo.

Sometime in October 2004, an employee at Contractor #1 transmitted a document containing classified information over an unclassified fax line. Ex. U. On October 15, 2004, the Vice-President of Contractor #1 sent an e-mail to numerous employees, including the individual, stating that it appeared that the sender of the classified fax had not obtained a DC review of the document prior to transmitting it, commenting that the "Born Classified Memo" applied to the situation at issue. *Id.* On either October 16 or 18, 2004, the individual advised his subordinates that "Effective immediately and until further notice all forms of communications (regular mail delivery, faxes, e-mail, etc.) that include technical information will be reviewed by an Authorized Derivative Classifier and approved by me or my designees personally—UNLESS the documents are already properly marked as CLASSIFIED." Ex. 12.

On November 24, 2004, the DOE issued a memorandum regarding "Preliminary Manufacturing Operations" and established a requirement that all Contractor DCs at Contractor #1 have certain items reviewed by the DOE Classification Officer prior to the dissemination of information. Ex. 8, Attachment 6. On December 4, 2004, the individual sent an e-mail to Contractor #1's manufacturing partners, with copies to two of his DCs, in which stated as follows: "I would appreciate if you would instruct all your team members to not ask any questions of, or ask for guidance from, DOE, particularly anything regarding classification. As the result of a recent question, DOE has issued classification guidance that we will all find most burdensome to implement." Ex. 13, S-3. The individual argued at the hearing that his intent in sending the e-mail was to tell the manufacturing partners not to ask classification questions of a physical security specialist from DOE who was slated to be at the manufacturing partner's work site. *See* Day 1 Tr. at 155-157. I found the individual's explanation not plausible. The second sentence in the December 4, 2004, e-mail specifically references DOE classification guidance which the individual characterizes as "burdensome for Contractor #1 to implement." The logical implication of the December 4, 2004, e-mail, coming in such close proximity to the November 24, 2004, DOE "Preliminary Manufacturing Operations" memo, is that the individual was directing others to circumvent the DOE's explicit instructions.

A few days before the December 4, 2004, e-mail referenced in the paragraph above, the individual informed the Vice President of Contractor #1 via e-mail that the facility under his control had a "very minor IOSC this morning," explaining that classified information had been created on two unclassified computers. Ex. 12. In response, the Vice President told the individual that "this is a repetitive problem, and any security violation at this point is not 'very minor' . . . they all track to people blowing off the rules." *Id.*

In April 2005, Mr. X, the subcontractor who drafted the Supplemental Classification Guide, reviewed a number of documents on an unclassified server at DOE Contractor #1's facility, and identified 80 potential classification issues of concern. Ex. 8. The Contractor DCs and other contractor classifiers at Contractor #1 reviewed the 80 issues

and determined there to be one piece of potentially classified information on the unclassified system. *Id*. Unsatisfied with the review by Contractor #1 personnel, Mr. X sent a letter to the DOE outlining 14 of the 80 classification issues that concerned him most. Ex. 8. DOE would later determine there to be merit to the 14 classification issues as well as 16 additional classification matters. Ex. 13. The matters brought to DOE's attention by Mr. X lead to two significant actions: a stand-down of all classified operations at Contractor #1 and its manufacturing partners, and the appointment of an Inquiry Official to investigate the incidents, identify corrective actions, and establish a root cause for the incidents. *Id.*

On July 7, 2005, the Inquiry Official issued the IOSC Report in connection with the incidents identified above. *Id.* According to the IOSC Report, the management at Contactor #1 allowed administrative controls to be bypassed for the sake of expediency, budget and schedule, and created an environment that condoned lax or non-existent compliance with DOE classification guidance. *Id.*

Contractor #1 conducted an Independent Review of the IOSC Report and issued a Report on August 22, 2005 (hereinafter the "Review"). Ex. I. The Review found that certain managers, including the individual, inappropriately directed DCs not to implement DOE classification guidance. It also concluded that the nonconservative decisions made by the DCs "were primarily caused by direction from [managers, including the individual] and assurance from them that Contractor #1 would 'indemnify' them for any decisions made not in accordance with DOE classification guidance." *Id.*

The individual testified that Contractor #1 told him on September 30, 2005, that he would no longer be a manager, that the company was reorganizing, and that he was not part of the reorganization. *See* Day 1 Tr. at 129, 200. The individual received a severance package and was terminated effective October 7, 2005. *Id.* at 129-130. On October 24, 2005, Contractor #1 issued one Security Infraction to the individual; on October 25, 2005, Contractor #1 issued two more Security Infractions to the individual. *See* Ex. 2.

V. Analysis

I have thoroughly considered the unclassified record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c).[10] After due deliberation, I have determined that the individual's access authorization should not be granted. I cannot find that granting the individual's DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a).

[10] Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

In his attempt to mitigate the derogatory information contained in the SOC, the individual raised a number of arguments, some attacking the factual underpinnings of the allegations contained in the SOC, and others grounded in claims of bias and unfair treatment. The individual also presented letters attesting to his integrity, and testimonial evidence to the same effect. Below is my analysis of the individual's arguments and other potentially mitigating evidence.

1. The Security Infractions at Issue Are Supported By Some of the Evidence

The individual first argues that the Security Infractions issued to him are "unfounded" so he cannot be blamed for the security incidents that lead to the compromises of classified information at issue. *See* Day 2 Tr. at 202. The key issue before me is the extent, if any, to which the individual may have influenced or sanctioned numerous erroneous classification decisions made by the Contractor DCs during the time when the Contractor DCs worked for the individual. As discussed below, an in-depth analysis of the subject Security Infractions leads me to conclude that there was some factual support for all three of the Security Infractions issued to the individual.

a. Security Infraction #1

Security Infraction #1 first refers to a memorandum issued on November 24, 2004 by a DOE Classification Officer regarding "Preliminary Manufacturing Operations." The November 24, 2004, memorandum established the requirement that all Contractor DCs at Contractor #1 have certain items reviewed by the DOE Classification Officer prior to disseminating the information. Ex. 8, Attachment 6. Security Infraction #1 next refers to an e-mail dated December 4, 2004, which the individual sent to the manufacturing partners of Contractor #1 and two of Contractor #1's DCs. In the December 2004 e-mail, the individual stated: "I would appreciate if you would instruct all your team members to not ask any questions of, or ask for guidance from, DOE, particularly anything regarding classification. As the result of a recent question, DOE has issued classification guidance that we will all find most burdensome to implement." Ex. 13, S-3. It is alleged that the individual's e-mail caused the Contractor DCs at Contractor #1 not to follow the Preliminary Manufacturing Operations memorandum, which, in turn, resulted in numerous misclassifications.

At the hearing, the individual explained that around the time he sent the November 24th e-mail, a DOE physical security person, was on-site with one of the manufacturing partners. *See* Day 2 Tr. at 214. According to the individual, the DOE physical security person later complained to a DC at Contractor #1 that the manufacturing partner in question was asking him questions about classification that he could not answer. *Id.* The individual claims that it was for this reason that he sent the e-mail to three manufacturing partners. *Id.* That explanation seemed plausible until the DOE Counsel asked the individual why, if that was the situation, he wrote in his e-mail, "As a result of a recent question, DOE has issued classification guidance that we all will find most burdensome to implement." *Id.* at 215. The individual responded, "I don't know but it wasn't the preliminary manufacturing operations memo." *Id.*

The individual also testified that the manufacturing partners who were the recipients of his December 2004 e-mail were not doing classified work and did not have secure means of communication at the time. Id. at 221-226. For this reason, he contends that his e-mail cannot be construed as advising the manufacturing partners not to ask DOE questions about classification. *Id.* I was not persuaded by the individual's argument because he admitted under questioning later in the hearing that at least one of the e-mail recipients was working on some classified material. *Id.* at 226.

Finally, the individual argues that the Review of the IOSC Report acknowledges that the words "preliminary manufacturing operations" are not in the subject e-mail, and that the infraction is not supported by the facts. *Id.* at 216. What the Review of the IOSC Report actually says is that one needs to be cautious about the information contained in the evidence files included with the Inquiry Official's IOSC Report. Ex. 13. The Review points to the November 24, 2004, e-mail in particular and states that "it is not possible to state with certainty the actual context of that e-mail." *Id.* The Review then mentions that the individual informed those reviewing the IOSC Report that the November 24, 2004, e-mail was intended "to indicate that the appropriate line of communication with DOE on classification matters was through Contractor #1's Classification Officer." *Id.* This interpretation is certainly not apparent from the e-mail itself and it is difficult for me to conclude that any of the e-mail recipients would have construed the verbiage, as written, in such a manner. Moreover, even if the appropriate avenue for classification advice and guidance was through the Contractor #1's Classification Officer, a clearance holder is always free to elevate a classification issue to the DOE. In fact, the DOE Classification Analyst testified that one of Contractor #1's partners had called the DOE directly for assistance with a project tasked to it by Contractor #1 because Contractor #1 had not given guidance to the partner on what was or was not classified in the project. This contact between the DOE and the manufacturing partner occurred just prior to DOE's issuance of the "Preliminary Manufacturing Operations" memorandum. In fact, it appears from the testimony of the DOE Classification Analyst that DOE issued the "Preliminary Manufacturing Operations" memorandum to provide classification guidance to the manufacturing partners of Contractor #1. *See* Day 1 Tr. at 38.

In the end, the burden was on the individual to convince me that he did not intentionally or inadvertently cause the recipients of that e-mail to ignore DOE's classification guidance. I find that the individual has not met this burden. [11]

b. Security Infraction #2

Security Infraction #2 recites that the DOE issued the Born Classified Memo on July 20, 2004, requiring that certain items be reviewed by a DOE Classifier prior to disseminating the information.[12] On August 16, 2004, the individual sent an e-mail to the DCs at

[11] The Contractor DC who testified did not provide any probative testimony either in support of Security Infraction #1, or in mitigation of that infraction.

[12] The Born Classified Memo not only required that a Contractor Classifier or Contractor DC seek assistance, if needed, from a DOE Classification Officer, it also clearly stated that "if a classification guide

Contractor #1 advising them to continue making classification decisions as they had been. The implication here is that the individual granted his DCs permission to disregard the Born Classified Memo.[13] In his defense, the individual claims that he was merely transmitting the orders of his manager. *See* Day 2 Tr. at 227, 247. He did admit in response to my questioning that he had the authority and discretion to tell his DCs to follow the DOE's classification requirements and adhere to the Born Classified Memo until his management had consulted with the DOE, instead of directing the DCs to ignore the Born Classified Memo until his management worked the issue with DOE. *Id.* at 248. He argued that it was not his job to make classification decisions or give classification guidance. *Id.* at 240. Under questioning by the DOE Counsel, the individual did admit that it was his job to ensure that nothing classified was released from the project under his leadership. *Id*. at 241.

In considering whether the individual's conduct should be excused because he was merely "following orders," I considered and weighed heavily the testimony of the Personnel Security Specialist from the LSO who opined that a prudent person in the individual's position (*i.e.* a manager in a highly classified project who holds a security clearance) does not instruct his people "to do business as usual." *See* Day 1 Tr. at 115. Based on the totality of the record before me, I have determined that it was reasonably foreseeable that the individual's instruction to his DCs to "do business as usual" could result in his DCs failing to protect classified information. I find further that the individual, as a clearance holder, had an obligation to protect potentially classified information at the highest level pending clarification by the DOE of the Born Classified Memo. The fact that the individual's immediate supervisor sanctioned the imprudent course of action taken does not relieve the individual of fulfilling his responsibilities as a security clearance holder. [14]

c. Security Infraction #3

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does not contain a specific topic for an iota of knowledge, you are not authorized to synthesize/invent your own unclassified value or status . . . When acting as an authorized classified, your first loyalty should be to the security of the United States . . . Do not take liberties with Classification Guides. Be conservative. Unusual, complicated, challenging or new issues described in the documents you are reviewing will necessitate your calling your appointing Classification Officer for assistance." Ex. 13.

[13] During the January 2007 PSI, the individual admitted that he willfully ignored the Born Classified Memo as he allegedly awaited guidance from his boss. Ex. 7 at 42. At the hearing, he denied making the statement until I read the relevant citation from the PSI transcript to him. Day 2 Tr. at 300. He then responded, "Look, I said that. I'm not denying that I said that. But I don't agree with that now that I see everything." *Id.* at 301.

[14] The Contractor DC admitted when questioned by me at the hearing that he, as a clearance holder, was required to protect information at the highest level if a doubt existed about whether to protect the information or not to protect the information. *See* Day 2 Tr. at 149-150. After reflecting upon my question, the Contractor DC stated that had he thought of his responsibility in that way, he would have allowed the program to shut down until the classification matter was resolved. *Id.* I found the Contractor DC's response surprising given that as a DC he should have had a heightened sensitivity to the protection of classified information.

Security Infraction #3 states that the individual committed to his management on October 16, 2004, to be responsible for ensuring that his Contractor DCs reviewed information at his facility.[15] It is alleged in Security Infraction #3 that the individual failed to obtain DC reviews of items contained in Weekly Reports on four separate occasions, implying that the individual had failed to fulfill his October 16, 2004, commitment (hereinafter October 2004 commitment). The Weekly Reports that purportedly support Security Infraction #3 are identified as Exhibits Z-5, Z-6, Z-7 and Z-10.

As an initial matter, the individual denied at the hearing that he originated[16] any of the Weekly Reports identified in Security Infraction #3. *See* Day 1 Tr. at 184. He admitted, however, that the Weekly Reports in question might have been generated by someone in one of his divisions. *Id*. at 188. He maintained that because those Weekly Reports pre-dated his October 2004 commitment, he cannot be charged with abrogating his commitment to ensure that certain matter be reviewed by a DC before its release from his facility. From the record before me, it appears that that the Weekly Reports in question are dated August 13, 2004, September 17, 2004, and September 24, 2004. [17] Assuming these dates are correct, it is true that the individual did not violate the explicit October 2004 commitment that he made to his management. However, I am troubled that he did not proactively address the classification problems in his facility before being asked to do so by his upper management. The individual admitted at the hearing that he realized on August 16, 2004, that there were classification issues in his facility. *See* Day 1 Tr. at 196. Yet, at least two Weekly Reports containing classified information were released from his facility in September 2004.

In the end, even if it is true that the individual did not violate his explicit commitment to his management on October 16, 2004, to ensure that his subordinates were adhering to

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[15] As noted in Section IV. above, the individual sent the following e-mail to his subordinates to prevent another incident like the one where a classified fax was sent over an unclassified fax line: "Effective immediately and until further notice all forms of communications (regular mail delivery, faxes, e-mail, etc.) that include technical information will be reviewed by an Authorized Derivative Classifier and approved by me or my designees personally—UNLESS the documents are already properly marked as CLASSIFIED." Ex. 12.

[16] It is DOE policy that the originator of any matter that may be classified must ensure that the matter is reviewed for classification by a derivative classifier. *See Information Security*, DOE Manual 470-4-4 and prior versions of that manual.

[17] The sanitized version of the Final Incident Report of the IOSC and its attachments contain numerous redactions and it is difficult to determine whether the attachments have been deliberately omitted for classification reasons, or whether they are simply missing from the sanitized document provided to me. For example, it appears that Exhibit Z-10 is classified since it is not contained in Exhibit 13 and the index to the IOSC contains a void where Exhibit Z-10 should be identified. On the other hand, Exhibit Z-5 is identified in the index to the IOSC Report but is not included in the voluminous attachments to the IOSC Report. Exhibit Z-6, however, refers to three Weekly Reports which I presume are the three at issue in this proceeding. Exhibit Z-7 was provided to me at the hearing but it is not readily apparent to me what is considered a Weekly Report in that 12-page document.

their classification responsibilities, the record supports a finding that the individual failed to act in a conservative manner to ensure that classified information was properly safeguarded in the facility over which he had management responsibility.

2. Issues of Equity

The individual testified that he was unjustly singled out to answer the multiple incidents of security concern that occurred in the facility that he managed. *See* Day 2 Tr. at 246. He also claimed at the hearing that the Inquiry Official was biased (Day 1 Tr. at 176), that he "was framed" (Day 2 Tr. at 218), and that he is the victim of a "cover-up" (Day 2 Tr. at 310). To support his position on these matters, he presented the testimony of two witnesses who stated that the Inquiry Official had remarked at a staff meeting: "I'm going to personally see that that son-of-a-bitch will never hold a clearance." *See* Day 1 Tr. at 235-36, 257. Neither witness could provide any detail on when the Inquiry Official made the statement, the context in which the statement was made, or whether either thought the Inquiry Official harbored bias against the individual, or whether the Inquiry Official was expressing his exasperation with the number of compromises of classified information occurring in the facility under the individual's control.

Because the Inquiry Official was not called as a witness at the hearing, it is difficult for me to decide how to construe the statement attributed to him. What is clear, however, is that at least 28 compromises of classified information occurred in the facility that the individual managed even though at least two persons, Mr. X and the person who was later named as the Inquiry Official, were warning the individual and others about potential classification problems in the facility. It is not unreasonable that the manager of the facility should be held accountable for issues brought to his attention that he failed to address in a timely fashion.

I find that the evidence in the record undermines the individual's claim that he was "singled out" to answer for the alleged compromises of classified information. Other employees of Contractor #1 who bore some responsibility for the 28 compromises, including one of the Contractor DCs who testified, received Security Infractions for their actions relating to the misclassifications and releases of classified information. Two of the Contractor DCs had their DC authority revoked, and one was put on unpaid leave and told that he would never hold a management or supervisory position with Contractor #1. Ex. 13, Day1 Tr. at 314. There might also have been ramifications for others involved in the compromises that are not apparent from the record. In the end, however, the focus of this case is not on how the individual was treated in relation to others who were as or less culpable than he. Rather, the focus is on whether the individual has mitigated the security concerns associated with his action or inaction that lead to numerous compromises of classified information at the work site under his management and control. For the reasons discussed below, I find that he has not mitigated the security concerns before me.

3. The Total Person Concept

In evaluating whether the individual has mitigated the security concerns associated with Criterion G, I considered that he held a DOE security clearance for 40 years with, by his

own report, only one security infraction prior to 2005. Ex. 6 at 7-8. I also considered letters from three character references who all attested to the individual's integrity and character (Exhibits A,B and C), the testimony of a former subordinate who opined that the individual tried to ensure that his staff followed the rules (Day 1 Tr. at 297), and the testimony of a Security Manager at another DOE facility who shared his perception that the individual "tried to do what is right." *Id.* at 238.

Against these positive factors are the following negative ones. The breadth and scope of the misclassifications that occurred at the facility that the individual managed for Contractor #1 were so significant that they cannot be excused as isolated incidents. The circumstances surrounding the security incidents indicate that the individual had a pattern of not acting proactively to protect classified information and matter. In June 2004, the record reflects a heated exchange (Ex. 13, Z-7, Attachment B) between the individual and the person who ultimately served as the Inquiry Official in which the Inquiry Official warned the individual and one of his DCs not to do something because of some potential classification issues. It is reported that the individual ignored that cautionary warning. In August 2004, the individual interjected himself into the realm of classification by: (1) instructing his DCs "to do business as usual," and (2) advising them that they would be indemnified for not complying with the Born Classified Memo. Only two months later, one of the individual's subordinates sent a classified facsimile over an unclassified fax line, another signal of classification problems at the work site. By December 2004, classified information was created on two unclassified computers, actions that the individual characterized as a "very minor" incident of security concern. This characterization underscores the individual's lack of appreciation and sensitivity to classified issues in the workplace. It was the individual's upper management who chastised him for his attitude and opined that "this is a repetitive problem" caused by people "blowing off the rules." By April 2005, Mr. X identified 80 potential classification issues of concern at the facility managed by the individual, 28 of which were confirmed by the DOE to have merit. It is difficult to understand how a manager who oversaw a facility that engaged almost exclusively in classified activities did not embrace more seriously his obligation as a security clearance holder to ensure that classified information generated in his facility was protected at the highest level possible. In my view, it is significant that the individual has not assumed responsibility for his actions, or inactions, that appear to have contributed to his former facility's significant failure to protect classified information. I cannot recommend granting a security clearance at this point to someone who refuses to acknowledgement responsibility for his past actions or to commit affirmatively to future actions that are commensurate with safeguarding classified information.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criterion G. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has not brought forth convincing evidence to mitigate the security concerns associated with Criterion G. I therefore cannot

find that granting the individual's access authorization will not endanger the common defense and is clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not be granted. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Ann S. Augustyn
Hearing Officer
Office of Hearings and Appeals

Date: October 17, 2008